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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 218

RAILROAD COMMISSION OF TEXAS, LON A. SMITH, ERNEST O. THOMPSON AND JERRY SADLER, ETC., ET AL.,

vs.

ROWAN & NICHOLS OIL COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS.

STATEMENT AS TO JURISDICTION.

GERALD C. MANN,
Attorney General of Texas,
JAMES P. HART,
TOM D. ROWELL, JR.,
EDGAR CALE,
E. R. SIMMONS,
Assistant Attorneys General of Texas,
Counsel for Appellants.

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IN THE DISTRICT COURT OF THE UNITED STATES,
FOR THE WESTERN DISTRICT OF TEXAS,
AUSTIN DIVISION

Civil Action.

No. 46

ROWAN & NICHOLS OIL COMPANY,

Plaintiff,

vs.

RAILROAD COMMISSION OF TEXAS, LON A. SMITH, E. O. THOMPSON, AND JERRY SADLER, AND GERALD C. MANN, ATTORNEY GENERAL OF TEXAS, IN THEIR OFFICIAL AND INDIVIDUAL CAPACITIES,

Defendants.

STATEMENT AS TO JURISDICTION AS REQUIRED BY SUPREME COURT RULE 12.

The jurisdiction of the Supreme Court of the United States is invoked under Sections 238 and 266 of the Judicial Code, as amended by the Act of February 13, 1925 (United States Code, Title 28, Sections 345 and 380).

The judgment of the three-judge District Court here appealed from was dated May 28, 1940, and was entered on the 29th day of May, 1940. Petition for appeal is herewith presented on the 14th day of June, 1940.

This action was brought by Rowan & Nichols Oil Company, a Texas corporation, against the Railroad Commission of Texas, and Lon A. Smith, E. O. Thompson, and Jerry Sadler, in their official capacities as members of and composing the Railroad Commission of Texas, and Gerald C. Mann, Attorney General of Texas, in his official capacity as such, and against all of said defendants individually, to enjoin the enforcement of proration orders issued by the Railroad Commission of Texas limiting and prorating the production of oil from the East Texas oil field. The plaintiff sought interlocutory injunctive relief, as well as final injunctive relief, against the Railroad Commission of Texas and the Attorney General of Texas to restrain said officers of the State of Texas in the enforcement and execution of such proration orders made by the Railroad Commission of Texas acting under and pursuant to the statutes of the State of Texas. The plaintiff asserted that such injunctive relief against said officers should be granted upon the ground of the unconstitutionality of such proration orders because plaintiff alleged that they deprive the plaintiff of its property without due process of law and deny to it the equal protection of the laws in violation of the 14th Amendment to the Constitution of the United States.

In its complaint filed in the District Court of the United States for the Western District of Texas, Austin Division, on the 22nd day of January, 1940, the plaintiff attacked the validity under the United States Constitution of the proration order of the Railroad Commission of Texas, dated December 20, 1939, in so far as said order fixed the allowable production of oil from the East Texas oil field. The portion of said order which was attacked by the plaintiff in its complaint was as follows:

> "Rule 23 of Division 3, as contained in an Order of the Commission dated October 17, 1933, pertaining to the East Texas Field as amended by an order of the

Commission dated September 11, 1939, is hereby readopted and amended as follows:

"Whereas, The Commission finds that in order to prevent waste in said field that the allowable production during the month of January, 1940, should not average more than 450,000 barrels per day over the thirty (30) day period, and that no more than 690,000 barrels of crude oil should be produced from the East Texas Field in any one day during the month of January, 1940, and

"Whereas, The Commission finds that there exists a market demand for crude oil produced in such an amount in the East Texas Field during the month of January, 1940:

"It is Therefore Ordered That Rule 23, of Division 3, of the Commission's Order of October 17, 1933, pertaining to the East Texas Field be and it is hereby amended to read, effective January 1, 1940, as follows:

" 'Rule 23. (A) Not more than 690,000 barrels of crude oil shall be produced from the East Texas Field during any day of the effective period of this Order.

" '(b) The total daily allowable for the field shall be distributed among the producing wells in the field on the following basis:

" '1. Each well capable of producing twenty (20) barrels of crude oil per day shall be allowed to produce twenty (20) barrels per day.

" '2. Each well incapable of producing twenty (20) barrels per day shall be allowed to produce that amount of oil which it is capable of producing in a 24-hour period, not in excess of twenty (20) barrels.

" '3. In addition to the twenty (20) barrels provided for in one (1) above, each well in the field which is capable of producing in excess of twenty (20) barrels daily shall be allowed to produce daily that proportion of the total daily allowable for the field remaining after deduction for one (1) and two (2) above have been made, that the product of each well's hourly

potential by its bottomhole pressure by the thickness of the saturated Woodbine Sand underlying the well by the average number of acres per well in the lease bears to the sum of such products for all of the wells in the field.' ''

The proration order of December 20, 1939, in so far as it allocated to each well in the field capable of making as much as twenty barrels per day a base or minimum allowable of twenty barrels, was attacked by the plaintiff on the ground that it operated to deprive plaintiff of its fair share of the daily allowable from the East Texas oil field and denied to it the equal protection of the laws and resulted in a taking of its property without due process of law, contrary to the provisions of the 14th Amendment to the Constitution of the United States. The plaintiff alleged that it was the owner of its Todd "A" lease, upon which it had drilled seven wells upon a lease containing about 28.25 acres, and that it was allowed to produce approximately 37 barrels per day from each of its said wells. The plaintiff asserted that it had the legal right to produce "that proportion of the daily allowable that the recoverable oil under its lease bears to the total recoverable oil in the East Texas field," but that the Railroad Commission, by the proration orders complained of had deprived the plaintiff of this right.

On February 6, 1940, an order was entered by the Judge of the District Court convening a three-judge District Court for February 12, 1940, to hear the plaintiff's application for a preliminary injunction. Because of the illness of Circuit Judge Edwin R. Holmes, the three-judge District Court did not convene until February 13, 1940, when it was convened at Austin, Texas, with Circuit Judge Samuel H. Sibley and District Judges Robert J. McMillan and James V. Allred sitting.

On February 12, 1940, the plaintiff filed a supplemental complaint, attacking the constitutionality of the proration order of the Railroad Commission for the East Texas field, dated January 24, 1940, and seeking to enjoin the defendants from executing and enforcing said order. The plaintiff alleged that the order of January 24, 1940, extended and was substantially the same, in the manner of the allocation of the field allowable, as the order of December 20, 1939, attacked in the original complaint, and hereinbefore set out.

In the answers which they filed to the complaint and to the supplemental complaint, the defendants alleged that the orders of the Railroad Commission complained of were a proper exercise of the authority delegated to the Railroad Commission under the statutes of the State of Texas to regulate the production of oil and gas, that such orders were reasonably necessary in order to prevent waste and in order to protect the correlative rights of the owners of oil and gas properties within the East Texas field, and that such orders were not in violation of the statutes of the State of Texas or the 14th Amendment to the Constitution of the United States.

This cause was heard jointly, under the provisions of Rule 42(a) of the Rules of Civil Procedure, with Civil Action No. 31, entitled *Humble Oil & Refining Company* v. *Railroad Commission of Texas et al.*, and Civil Action No. 36, entitled *F. W. Fischer* v. *Lon A. Smith et al.*, since all of said actions involve common questions of law and fact.

The hearing of evidence in said actions was completed on February 16, 1940, at which time it was stated by the plaintiff that without waiving but insisting upon its prayer for a preliminary injunction, it also submitted the case for decision upon its prayer for a permanent injunction. The

court thereupon took the case under advisement until February 21, 1940, when it then announced that it would enter judgment denying to the plaintiff in this action a preliminary injunction, but granting to the plaintiff a permanent injunction restraining the defendants in the enforcement and execution of the proration orders attacked. The court then stated, however, that it would withhold entering its decree for a period of ten days, during which time the Railroad Commission could consider whether it would submit to said judgment or would appeal. The court announced that if the Railroad Commission decided to enter a new proration order and submit to the judgment of the court, it would give additional time within which to hold a hearing.

A copy of the oral opinion of the court delivered on February 21, 1940, is attached hereto and marked "Exhibit A".

On March 1, 1940, the Railroad Commission indicated to the court its intention to appeal from the decision granting to the plaintiff a permanent injunction. At the same time, the Railroad Commission filed a motion for a stay pending appeal, alleging that unless a stay was granted, serious and irreparable damage would be done to the whole East Texas Oil field and to the oil industry in the State of Texas as a whole, and that defendants would in effect be deprived of their right of appeal.

The three-judge District Court was reconvened at Houston, Texas, on March 14, 1940, Circuit Judge Samuel H. Sibley and District Judge Robert J. McMillan being present, but District Judge James V. Allred being unable to attend. The defendants presented to the court their motion for a stay of the judgment pending appeal and the two judges then sitting announced that the stay would be granted for a period of sixty days from the date of the judgment. Thereafter, on May 28, 1940, a final judgment was entered by the court, permanently enjoining the de-

fendants from enforcing or executing the orders of the Railroad Commission attacked, and further providing that the injunction should be stayed for a period of sixty days from the date of the judgment.

A copy of the final judgment of May 28, 1940, is attached hereto and marked "Exhibit B". A copy of the court's findings and conclusions is attached hereto and marked "Exhibit C".

The Railroad Commission of Texas is an administrative commission acting under and pursuant to the statutes of the State of Texas, relating to the conservation of oil and gas, Revised Civil Statutes of Texas, Title 102. In this action the plaintiff sought interlocutory injunctive relief, as well as final injunctive relief, suspending and restraining the enforcement of orders of the Railroad Commission of Texas, acting under and pursuant to the statutes of the State of Texas and restraining the action of the Railroad Commission of Texas and its members and the Attorney General of Texas in the enforcement and execution of such orders.

The issues in this appeal are similar to those in the case of *Railroad Commission of Texas, et al.*, v. *Rowan & Nichols Oil Company*, decided June 3, 1940, by this court. The case of *Railroad Commission of Texas, et al.*, v. *Humble Oil and Refining Company*, case No. 57, October Term, 1940, which was tried jointly with this case in the District Court, is now pending in this court, probable jurisdiction having been noted by the court on June 3, 1940.

The appeal prayed for is to the Supreme Court of the United States from the final judgment granting a permanent injunction and is provided for by the Act of February 13, 1925, p. 299, Sec. 1 (28 U. S. C., Sec. 380).

The cases believed to sustain the jurisdiction of the Supreme Court of the United States upon this appeal are:

Stratton v. *St. Louis, Southwestern Railway Co.*, 282 U. S. 10; *Oklahoma Natural Gas Co.* v. *Russell*, 261 U. S. 290.

Respectfully submitted,

(S.) GERALD C. MANN,
Attorney General of Texas;
(") JAMES P. HART,
Assistant Attorney General;
(") TOM D. ROWELL, JR.,
Assistant Attorney General;
(") EDGAR CALE,
Assistant Attorney General;
(") E. R. SIMMONS,
Assistant Attorney General;
Attorneys for Defendants, Austin, Texas.

EXHIBIT A.

UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION.

No. 31. Civil.

HUMBLE OIL & REFINING CO.

v.

RAILROAD COMMISSION OF TEXAS et al.

Attorneys for Plaintiff:

Rex G. Baker, E. E. Townes, R. E. Seagler, Felix A. Raymer, Carl Illig, Jr., R. E. Hardwicke, Powell, Rauhut & Gideon.

Attorneys for Defendants:

Gerald C. Mann, Attorney General of Texas, James P. Hart, D. D. Mahon, E. R. Simmons, Tom D. Rowell, Jr., Edgar Cale, and Lee Shoptaw, Assistant Attorney Generals.

No. 36. Civil.

F. W. FISCHER

v.

LON A. SMITH et al.

Attorneys for Plaintiff:

F. W. Fischer, W. T. Saye.

Attorneys for Defendants:

Gerald C. Mann, Attorney General of Texas, James P. Hart, D. D. Mahon, E. R. Simmons, Tom D. Rowell, Jr., Edgar Cale, and Lee Shoptaw, Assistant Attorney Generals.

No. 46. Civil.

ROWAN & NICHOLS OIL CO.

v.

RAILROAD COMMISSION OF TEXAS et al.

Attorneys for Plaintiff:

Dan Moody, Rice M. Tilley.

Attorneys for Defendants:

Gerald C. Mann, Attorney General of Texas, James P. Hart, D. D. Mahon, E. R. Simmons, Tom D. Rowell, Jr., Edgar Cale, and Lee Shoptaw, Assistant Attorney Generals.

Tentative Conclusions of Law.

Judge Sibley: Are counsel present in the oil cases? They don't have to be.

Mr. Baker: Yes, sir, I am here for the Humble.

Mr. Cale: The Railroad Commission is represented. I don't believe Mr. Fischer has a representative here. I don't know.

Judge Sibley: He wouldn't have to be, of course. We are about, gentlemen, to announce our conclusions in a general way in these cases. The paper I am about to read is not final. It is in the nature of conclusions of law, but we reserve the right to modify or change them to meet more exactly our views, to express more exactly what we think the law is, if it becomes necessary, but for the present purposes, I read these conclusions, disposing of the cases.

First, the court has jurisdiction in each case.

Second, in the case of F. W. Fischer, an injunction, either temporary or permanent, ought not to be granted, because no irreparable injury is shown to him by the operation of the order. It does not operate unreasonably as to him.

We find, as it will appear, that the situation is otherwise as to the other litigants. We think that the present injury to each of them is clear, practically admitted, and the only

reply to it is that in the future the injury under this order may be returned to them. We regard that contingency as so uncertain as to make it our duty to look principally to the present operation, and to say that they have established such an injury in its nature irreparable, and without any other remedy at law as to make it our duty to examine the order.

That part of the order which fixes the top allowable made to prevent waste, the Commission had power to make, and it is not arbitrary or unreasonable. The statute which declares that pumping wells of the depth that all wells have in the East Texas oil field and which can produce no more than twenty barrels per day in thirty consecutive days are "marginal wells", and not to be restricted by the Commission is not patently invalid. These wells are almost wholly on the edges of the field and are approaching exhaustion. The Legislature could make of them a separate class, and in view of the expense of operating them by pumping and of their probably short life, the fixed allowable granted them is probably not arbitrarily fixed. The amount of the present top allowable to them is less than one per cent, and the effect of it on the fairway wells which are here complaining is too uncertain and insignificant to require a decision on the constitutionality of the statutory classification.

The portion of the order which prorates the remainder of the top allowable among the non-marginal leases and wells so operates that about three-fourths of it is distributed on a flat basis per well so as to give each well an initial twenty barrels per day, but with three days of shut down each week, it makes an equivalent of about 11.7 barrels per day. The remaining one-fourth is prorated by a formula which takes account of the productive capacity or potential of each well, and the acreage, sand thickness, and bottom hole pressure of each lease, all as factors in fixing the allowable for the wells on the lease. This operates to restrict more drastically the production from the best wells and leases in the fairway, where all those of Rowan & Nichols Company are and most of those of Humble Oil Company, than that from less productive wells to the east and west, and that from more densely drilled leases in the

fairway. Is this result so unreasonable as to make the order contrary to the statutes or the Fourteenth Amendment?

The question under the two seems to be approximately the same. If the proration is unreasonable, the statute doesn't give the Commission authority to make it. If it is so unreasonable as to be arbitrary, the Constitution does not permit *to* to be done either by the Legislature or the Commission.

The Commission as to all wells at first made a straight per well proration. The Commission's orders of this sort were held unreasonable. A later order which combined well potential with a flat per well allowance so that about half of the total was distributed according to potential was upheld as reasonable. It is not now urged that no basic flat per well allowable should be made, but only that three-fourths of the whole should not reasonably be so apportioned. The reason for distributing three-fourths of the allowable on a flat basis per well, or for distributing any of it on that basis, is not precisely disclosed. As in the case of marginal wells, it seems to be thought necessary in order to keep the poorer wells, especially those having to be pumped, going at all. If they were forced out, the oil they would produce might in fact never be produced, causing waste; or shut down might be a deprivation of their owners' property contrary to the Constitution. The evidence here, however, is that even with a pumping well production can be profitably continued on five to ten barrels per day. We can think of no reason why a higher allowable per day should be fixed for non-marginal wells when to do so makes three-fourths of the distributable oil go neither according to the productive capacity of the wells nor according to the oil belonging to the several leases. That the Legislature fixed a figure of twenty barrels for marginal wells is without great significance, for they are perishing wells. Others which are near the border line will soon enough enter that class, and need not prematurely be treated as such. The drilling density of wells is so diverse on different leases otherwise comparable that to distribute three-fourths of a top allowable on a flat basis per well without reference to the oil reserves of the lease or the

productive capacity of those wells, which constitute the value of the property, is unreasonable and therefore in violation of the Constitution and the statute. It is not for us to suggest a proportion or a formula. We think the present proportion unsustainable.

We do not say that the time element, the probable life of the wells, may not be considered in an apportionment, though there is necessarily much uncertainty involved. We do not say that either presently or ultimately each lease *much* be allowed to produce in exact proportion either to its present or original oil in place. All of these may be given a reasonable consideration, sacrificing property interests as little as may be in the effort to achieve the public aim of conservation. Some inequalities attend all legal regulation, and must be borne, but the regulation itself must be on a fair principle and founded on good reason. Previous decisions have established a flat per well apportionment to be unreasonable, and also one which was substantially that, though some effect was given to well potential. We now hold that with the wide differences in well density and in well capacity that exists in the East Texas field, an apportionment of three-fourths on a flat per well basis is not justified by a good reason—is unreasonable.

As the conclusion from this holding, we will deny the temporary injunction to the Rowan & Nichols Company for the reason that one was denied in respect to the Humble Company, and we think it best to let matters go along on an even keel with no differences in the oil field. Permanent injunctions will be granted both to the Rowan & Nichols Company and to the Humble Company, but we do not wish to enter the injunctive decrees and upset the oil field until an opportunity has been given to decide the future of this case. For that reason, for the period necessary to make a determination, about which we will hear you gentlemen, we desire that a decision be reached as to whether or not an appeal is to be taken, or whether the decision will be submitted to on the part of the Railroad Commission.

If it is to be submitted to, they probably would desire time to make a new order, in order to avoid upsetting the operations in the field. If it is to be appealed, we would,

of course, have to enter the final decrees that they might be appealed from, but the effect of it could be controlled by orders or supersedeas of the proper sort. So that is the practical situation that we wish to handle. If there is an appeal, of course, findings of fact in which we would want the assistance of counsel would have to be prepared, and perhaps more exact or more elaborate findings of law, conclusions of law, but this states our decision of the case.

If the Commission or its representative could indicate to us what time they would like to consider the future course of matters, we would be glad, of course, to understand what that time is, and fix it. We will have to separate, but we would be glad to take care of it by mail.

Mr. Cale: May it please the court, I would like some hour or so to confer with the Railroad Commissioners on their desire in the matter. At this point I can't definitely tell the court what position they will take. I presume they will pursue the course of an appeal, but in the event that is not their desire in the matter, I would like to have some time to discuss it with them and report back to the court.

Judge Sibley: That is an entirely reasonable time.

Mr. Baker: I want to be sure, if the court please, that I understand. I assume that the court had in mind that the Commission would be given a reasonable time to make an order that would remedy the situation, or at least do away with this order which the court has held to be unreasonable.

Judge Sibley: If they wish to, we will consider that.

Mr. Baker: Yes, sir.

Judge Sibley: But they say for the present they want to decide whether they are going to appeal.

Mr. Cale: That is correct. I would like to have an opportunity to confer with the Commission and see what their wishes are and report back some time this afternoon or after lunch at the court's pleasure.

Mr. Baker: If the Commission should——

Judge Sibley: We don't want to rush you to an hour.

Judge Allred: We don't want to limit the conference with the Commission, as to whether you will appeal or not. You can confer with them about whether they will call a

hearing and perhaps pass another order. We will give you all of the time you need.

Judge Sibley: You can have all of the time you need to keep your business straight. That is the purpose of our question.

Mr. Cale: Yes, sir. We would like to have as much time in that regard as the court will give us. We would like to cooperate with the court as much as we can.

Judge Sibley: I think a week or ten days, if you want to consider the situation and arrive at a fixed conclusion that will be reasonable and right.

Mr. Cale: I understand the order will not be entered?

Judge Sibley: There will be no order entered at all within that time.

Mr. Cale: All right, thank you, sir.

Judge Allred: And, Judge, pardon me. I think the Commission would be entitled to this indication. If the Commission decides to hold a hearing—give notice and hold a hearing, with the idea in mind to prepare another order, we would be willing to extend that time.

Judge Sibley: I think so.

Judge Allred: They have to give ten days notice under the statute, if they want to do that.

Mr. Cale: Yes, sir, that is correct.

Judge Sibley: I really had in mind to give thirty days for a purpose of that sort.

Mr. Cale: We would appreciate having that time, your Honor. I didn't know what the court's disposition would be in regard to that matter. If you could give us thirty days——

Judge Allred: I think Judge Sibley meant we would give you ten days for the Commission to decide what they wanted to do, and if they wanted further time to give notice and have a hearing, we would be willing to give you thirty days, so as to give time to give that notice, as required. That is my understanding. That was your understanding, wasn't it, Judge.

Judge Sibley: Yes.

Mr. Cale: Thank you, sir.

Judge Sibley: We will not hold the Pullman Company lawyers in attendance. We will have to decide that case

a little more at our leisure. We can't decide it instantly, and we will file a decision when we reach it.

Mr. Moody: May I ask a question? All of the questions or exceptions and matters of that kind, I suppose, will be taken care of when the order is finally entered?

Judge Sibley: You don't need any exceptions now. They are obsolete.

Mr. Moody: Well, I wasn't sure about the new practice.

Judge Sibley: Well, we will take a recess. We will take a recess until two o'clock.

(The court then, at 12:10 o'clock p. m., Wednesday, February 21, 1940, recessed until 2:00 o'clock of the same day, at which time the following proceedings were had:)

EXHIBIT B.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION.

No. 46, Civil Action

ROWAN & NICHOLS OIL COMPANY

vs.

RAILROAD COMMISSION OF TEXAS.

Judgment.

The above entitled and numbered suit came on for trial at Austin, in the Austin Division of the Western District of Texas, on February 13, 1940, before S. H. Sibley, Judge of the United States Circuit Court of Appeals for the Fifth Circuit, James V. Allred, Judge of the United States District Court for the Southern District of Texas, and R. J. McMillan, Judge of the United States District Court for the Western District of Texas, said Court having been ordered and organized pursuant to Section 380, Title 28, of the Judicial Code to hear and determine Plaintiff's application

for an interlocutory injunction, when Plaintiff appeared by its counsel and announced ready for trial, and the Defendants also appeared by their counsel and announced ready for trial.

Whereupon, the Court heard the pleadings and the suit proceeded on trial from day to day until February 16, 1940, when introduction of testimony was concluded, and Plaintiff, while continuing to press its application for temporary injunction, then offered also to submit the suit for final decision on its merits upon the record made in the hearing of the application for temporary injunction; and the Defendants consented that the suit be decided on its merits upon the record made on the hearing of the application for temporary injunction; thereupon, the Court heard argument of counsel, and upon conclusion of arguments, the Court took the suit under advisement, and on February 21, 1940, in open court, announced it to be the decision, judgment, and opinion of the Court that the law and the facts were with Plaintiff, and that the orders of the Railroad Commission of Texas prorating oil production in the East Texas field, and more particularly the proration orders of date December 20, 1939, as amended, renewed and extended by the orders of January 24, 1940, allocating among wells in said field the daily field allowable, are unreasonable and void as to Plaintiff, and as construed, applied and enforced to control production from Plaintiff's wells, deprive Plaintiff of its property, contrary to the statutes of the State of Texas and in violation of the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States, and inflict upon Plaintiff daily and currently irreparable injury, for which Plaintiff has no adequate remedy at law; and the Court being of the further opinion that Plaintiff will hereafter daily and currently suffer irreparable injury, for which it has no adequate remedy at law, all contrary to the statutes of Texas and to the Fourteenth Amendment, as aforesaid, if said orders, or orders which are the same or substantially the same as the orders complained of, are enforced against Plaintiff's property and wells in the East Texas field, and especially to restrict production of oil by Plaintiff from its seven wells on its Todd "A" lease of 28.25 acres in the

William H. Castleberry League, Gregg County, Texas; at the same time, the Court announced that Plaintiff's application for interlocutory injunction would be denied, but that Plaintiff would be granted a permanent injunction; and at the same time the Court announced that the injunction order would not be entered for ten days, in order to allow the Defendants an opportunity to determine whether they desired to appeal, or for even longer, if Defendants desired to give notice, conduct a hearing, and promulgate a new and valid order; and Defendants having now announced that they do not elect to issue a new order, but desire to perfect an appeal, the Court is of the opinion that a permanent injunction, enjoining the Defendants from enforcing said orders as to Plaintiff and its said property, should be granted and the decree entered:

It Is Therefore Ordered, Adjudged and Decreed by the Court that the orders of the Railroad Commission of Texas of December 20, 1939, as amended, extended and renewed, by the orders of January 24, 1940, fixing and allocating among wells in the East Texas field the daily allowable for said field, which said orders are more particularly described in Plaintiff's pleadings, are null and void as to Plaintiff and its said property, and the Railroad Commission of Texas, Lon A. Smith, Ernest O. Thompson and Jerry (G. A.) Sadler, members of said Commission, and Gerald C. Mann, Attorney General of Texas, individually and officially, and their successors, representatives, agents, servants, attorneys and employees, be and they are each and all hereby permanently enjoined from enforcing or attempting to enforce against Plaintiff and its said property the above described and mentioned proration orders and the schedules issued in connection therewith, as well as any and all other proration orders, rules, regulations and schedules which have been or may be promulgated by the Railroad Commission of Texas for the East Texas field in renewal or extension of said orders and schedules, or which are the same or substantially the same, or have substantially the same effect as said orders and schedules of December 20, 1939, and January 24, 1940, as the same have been construed, enforced and applied to control production from Plaintiff's said property.

It is further Ordered, Adjudged and Decreed that the Defendants and each of them, their successors, representatives, agents, servants, attorneys and employees, are hereby permanently enjoined from denying to Plaintiff tenders to move, or from interfering in any way with the transportation and marketing of, the oil produced or to be produced in accordance with this judgment, and from suing for or from attempting otherwise to claim or collect penalties or to enforce forfeitures or in any other manner to penalize the oil or Plaintiff, on account of the oil produced or to be produced in accordance with this judgment.

This decree is entered, however, without prejudice to the right of said Defendants to enter a reasonable proration order and to fairly enforce it against Plaintiff.

All costs in this suit are taxed against Defendants.

The Clerk is directed to enter this judgment.

To which action, order, and judgment of the Court, the Defendants, in open court, duly excepted.

Defendants having declared in open court that they would prosecute an appeal from this judgment, enforcement of the injunction herein granted is stayed for a period of sixty days from the date hereof.

Entered at Austin, Texas, this the 28th day of May, A. D. 1940.

SAMUEL H. SIBLEY,
Judge, United States Circuit Court of Appeals, Fifth Circuit,

JAMES V. ALLRED.
Judge, United States District Court for the Southern District of Texas,

ROBERT J. MCMILLAN,
Judge, United States District Court for the Western District of Texas.

EXHIBIT C.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION.

No. 46, Civil

ROWAN & NICHOLS OIL COMPANY

vs.

RAILROAD COMMISSION OF TEXAS, et al.

Findings of Fact and Conclusions of Law.

As required by Rule 52 (a) of the Federal Rules of Civil Procedure, the court of three judges (consisting of Sibley, Circuit Judge, and McMillan and Allred, District Judges) makes the following as its findings of fact and conclusions of law in the above numbered and entitled action, and the court directs that the Clerk of this Court file such findings and conclusions of law as part of the record in this action.

A.

Findings of Fact.

1. The allegations of plaintiff in reference to parties, jurisdiction, and the import of the orders attacked are not denied, and have been sustained by proof and admissions.

2. The East Texas field is one hugh reservoir embracing originally some 133,000 acres of land and at present including some 131,330 to 131,800 acres of land situated in Rusk, Gregg, Smith, Cherokee and Upshur Counties, Texas; the field is approximately 40 miles long north and south, and has an average width of about 4 miles east and west. The reservoir is in the Woodbine sand at an average depth of some 3,650 feet below the surface. In it the oil is confined by an impervious formation (Austin chalk) above, and an impervious formation (Georgetown lime) and water below. A cross section of the field extending from west to east has the shape of a vast obtuse-angled triangle. One of the short sides (the westward side or base) of the triangle is a line

in the plane of oil-water contact. The other short side of the triangle is a line in the plane of the Georgetown lime, a formation extending eastward and upward. The angle formed by these to lines of the cross section is the obtuse angle of the triangle, and is the lower angle of the three. The long or top side of the triangle is in the plane of the Austin chalk and extends from the point of contact between the oil, the water and Austin chalk on the west side of the structure, upward and eastward to the eastern extremity of the field, at the point of contact of said upper Austin chalk with the Georgetown lime. On the extreme west edge the oil-saturated portion of the sand is very thin, being less than a foot or so in thickness; from the west edge of the field to the middle of the oil-saturated portion of the reservoir, or the so-called "fairway," it gradually increases in thickness until it attains a maximum thickness of about 90 to 100 feet in the "fairway". From the "fairway" to the east edge of the field, the oil-saturated sand gradually decreases in thickness until it is pinched out and vanishes on the east edge of the field. The Woodbine sand extends in a westerly and upward direction from the west side of the field to an outcropping some 100 to 150 miles west and northwest of the field. Underlying approximately the west half of the oil-bearing sand and extending westward and upward to the outcropping is a vast amount of salt water occupying practically all of the Woodbine sand except that occupied by oil and gas. This salt water exerts pressure against the oil and gas in the reservoir. The pressure originally was some 1,650 pounds per square inch, but as the field has been produced the pressures have been reduced, and a pressure gradient has been built up across the field from west to east ranging from an average of nearly 1200 pounds per square inch on the west to an average of about 900 pounds per square inch on the east. The pressure of the water is the principal source of reservoir energy. As wells are drilled into the producing sand, the reservoir pressures, consisting of water pressure and the expansion of the gas in solution in the oil, force the oil to the surface through the wells, thus affording the energy by which flowing wells in the field are produced. With respect to pumping wells, artificial means

must be used to lift the oil to the surface. The differential in pressures from west to east tends to drive the oil, as the field is produced, from west to east.

3. Gas is dissolved in the oil and will not come out of solution until pressures are reduced to approximately 750 pounds per square inch on the average. The presence of the dissolved gas makes the oil less viscous, and materially contributes to the movement of the oil through the pore spaces in the sand. If pressures are so reduced that gas comes out of solution, it will form bubbles in the producing sands and the oil will become more viscous, thus materially impairing the movement of oil through the sands. Gas has already come out of solution in a small area in the southeastern portion of the field.

4. Experience has shown that the field cannot for any extended period produce at a rate materially in excess of 400,000 barrels of oil per day without causing waste, considering that presently an average of about 200,000 barrels of water daily are being produced from the field with about 400,000 barrels of oil. If the top allowable for the field is placed too high, the reservoir pressure will drop rapidly and create conditions conducive to waste; and, considering the varying densities to which properties in the field have been drilled, there will be non-ratable withdrawals from the field, if much of the allowable be prorated on the per-well or per-well potential basis, or any basis giving too much value to wells or potentials, thus resulting in an uneven or irregular rise of the water table. This will cause large quantities of oil to be trapped off or enveloped by what is known as coning or channeling in the sand of the water, and will greatly reduce the ultimate recovery from the field, thus causing physical waste of oil which would otherwise be recoverable.

5. The Woodbind sand, in which the oil and gas are found in the field, is a very porous and highly permeable sand; there is intercommunication between all parts of the reservoir, thus permitting rather free movement of oil and gas from one portion of the reservoir to another. The fluids flow from areas of higher to areas of lower pres

sure, thus resulting not only in local migration of oil, but as the field is produced, the pressure of the waterhead at the west causes a general movement of oil upward and to the east.. This is a normal movement in the light of the pressure gradient across the field, high on west, lower in the east. A well drilled into the reservoir and operated under proper conditions of control of reservoir pressure will effectively drain an area of at least ten acres.

6. The number of acre feet of net effective oil sand in the field, or in a lease in any portion of the field, can be determined actually and relatively with reasonable accuracy by taking into consideration such factors as the number of acres of land in a lease and the average thickness of the net oil sand under the lease. It is likewise possible to determine with reasonable accuracy, actually and relatively, the quantity of oil per acre foot of net effective oil sand, and the quantity of recoverable oil in the field and in the various leases in the field assuming the conditions under which the field is to be operated. This is done continually for taxing authorities, loans, sales, and similar purposes.

7. Plaintiff owns an oil and gas lease on a 28.25 acre tract in the W. H. Castleberry Survey in Gregg County, Texas, known as its Todd "A" lease. If a line were drawn through the approximate center of the field, along the north to south axis of the field, it would mark the approximate center of the area of maximum thickness of the oil saturated sand, and is more or less the center or what is called the fairway or best part of the field. Plaintiff's lease is in the fairway or middle third of the field from north to south and some 3500 feet west of the above mentioned line. This area is most favorably situated on the structure, because of its thick sands of high permeability and porosity, large oil reserves, high potentials, and high bottom hole pressures; and either under open flow or under a plan of proration based on reserves, position on the structure, and similar factors, this area of the field would receive the benefit of its natural advantage over the east and west sides.

8. Competent petroleum engineers and geologists substantially agree concerning the amount of oil in place per

acre foot of net oil sand in the East Texas field. The percentage of the oil which can be recovered per acre foot depends upon the manner in which the individual wells and the field as a whole are operated. If a proper allowable for the field is maintained, and leases and wells are allowed to produce ratably, that is, in reasonable relation to their ability to produce and their underlying reserves, a higher rate of recovery per acre foot in the field may reasonably be expected than if the allowable for the field is excessive, or if excessive localized withdrawals are permitted in densely drilled areas. The opinions of competent engineers and geologists have varied in the past and may vary in the future as to what the actual rates of recovery per acre foot in the field will be in the future, due in part to differences in their assumptions as to the type of regulations that the Commission will enforce to control future operations in the field. Such change in estimates for the field may also be due to increased availability of information and better exchange of information among engineers and geologists. Such variances in estimated recovery, however, do not materially change the percentage which oil under plaintiff's lease bears to the total volume of oil in the field, because the changes are relative. The figures of the engineers of the Commission as to total estimated recovery per acre foot of sand in the field and as to the amount of oil in place under plaintiff's lease and the amount of oil in place in the field do not now vary substantially from those of plaintiff. Whether the rate of recovery per acre foot in the field be estimated high, medium, or low, plaintiff's rightful percentage of the oil actually recoverable from the field as a whole under proper proration and production regulations should not vary materially, due to the relation which exists between the number of acre feet of oil sand under a lease and the number of acre feet of oil sand in the field as a whole.

9. The total acre feet of sand in the field is estimated at 4,990,350 acre feet; the total acre feet of sand under plaintiff's Todd "A" lease is estimated at 2,627 acre feet; the average sand thickness in the field is 37.86 feet; the average sand thickness under plaintiff's Todd "A" lease

is 93 feet; the estimated recoverable oil per acre foot is 927.4 barrels; the revised estimate of the recoverable oil originally in the field is 4,628,054,299 barrels; the potentials and bottom hole pressures of wells on plaintiff's lease average 963 barrels per hour and 1115 pounds per square inch, respectively, as compared with the average of 605 barrels potentials and 1060 pounds pressure for the field; the revised estimate of the amount of recoverable oil originally under plaintiff's Todd "A" lease is 2,434,656 barrels; the amount of oil produced to January 1, 1940, from the entire field was 1,447,821,784 barrels, or 31.28% of the estimated amount of recoverable oil originally in place; the amount of oil produced from plaintiff's Todd "A" lease to January 1, 1940, was 493,120 barrels, or 20.25% of the estimated amount of the recoverable oil originally in place under the lease; the daily allowable for the field is 690,000 barrels for each producing day; the daily allowable for plaintiff's Todd "A" lease is 260.52 barrels for each producing day.

10. The East Texas field has been drilled to an average density of one well to approximately 5.17 surface acres. A very large number of these wells could be closed in without creating waste, due to the fact that great density exists in numerous places throughout the field where substantially fewer wells would reasonable drain all of the oil under any such tract or tracts. Plaintiff's lease has been drilled to an average density of one well to about 4.03 surface acres, but being on an approximate parity with the average density (computed on a basis of surface acreage) of the field or having even a slightly greater density will not enable plaintiff under the present order to produce its fair share of the oil, because the average density is calculated on surface acreage, and surface acreage generally bears no real relation to oil in place, position on the structure, and other facts that go to show the oil reserves of a tract or the ability of a property to produce. On the basis of drilling density per one hundred acre feet of sand, the field is drilled to a density of one well to 192 acre feet; plaintiff's lease is only drilled to a density of one well to 375 acre feet, or approximately one-half the average density of the field. Plaintiff's

part of the minimum allowable of 20 barrels per well per day is 20 barrels per 375 acre feet of sand. The average of the field is 20 barrels per day per 192 acre feet of sand.

11. There are small and closely drilled tracts in the immediate vicinity of plaintiff's lease. R. M. Wood is the alleged owner of one, which is about 1100 feet south of plaintiff's "A" lease and contiguous to its "B" lease. Wood has one well on one-third of an acre, with a daily allowable of 24.11 barrels per day. He withdraws daily from his well 81 barrels per 100 acre feet of sand, while plaintiff is permitted to withdraw from its "A" lease only a little more than 10 barrels per 100 acre feet of sand. Plaintiff drilled its 7 wells prior to 1934. Wood drilled his well in August, 1937, and since that time, up to January 1, 1940, had produced 15,272 barrels, leaving only some 11,000 barrels of original recoverable oil, having produced, therefore, up to date, on the basis of 45,816 barrels per surface acre, as compared with plaintiff's 17,456 barrels per surface acre of its "A" lease. At the present rate of production, Wood will have recovered an amount of oil equal to the amount of recoverable oil originally estimated to be under his tract in a total of 425 more days of production, whereas, assuming continuation of present rate of flow and plan of proration, plaintiff will be more than twenty-one years recovering the balance of its oil. Wood, like plaintiff, has as much oil in place now as originally, and while plaintiff will not recover as much oil as its original reserves, due to the fact that the water has approached much closer and the oil supply of the field has diminished, Wood, due to the present plan of proration, will recover more than the equivalent of his original recoverable reserves. The defendants did not offer any substantial evidence, and there was not any substantial evidence, to support the regulation requiring plaintiff to wait a long and indefinite period of time (if ever) to recover its oil, while others, including some in the immediate area with its lease, are permitted to recover, use, and enjoy their property now.

12. The effect of the order on plaintiff, as compared with others, was developed by the testimony. For example, plaintiff has 2627 acre feet of sand under its "A" lease,

with 7 wells on 28.25 surface acres; F. W. Fisher, on leases aggregating only 193 surface acres, with a total of 5,006 feet of sand, has a daily allowable of 1,692 barrels, as compared with plaintiff's 260 barrels. Fisher will get many times the amount of recoverable oil that was originally in place in his leases, while plaintiff will not be allowed to produce as much oil as the amount of oil it originally had or now has in place. While plaintiff's lease has a daily allowable of 10.11 barrels per hundred acre feet of sand, Hamil & Smith has a daily allowable of 62.62 barrels per hundred acre feet of sand; Pace Petroleum Company, with 4 wells on 1.4 acres, has a daily allowable of 140.9 barrels per hundred acre feet of sand, and the Ambassador Oil Company has a daily allowable of 127.15 barrels per hundred acre feet of sand. Numerous such situations were shown to exist throughout the field. There was not any evidence to support an order which so discriminates between operators and there was not any showing of any finding by the Commission, or evidence to support any finding by the Commission, that would justify such discrimination among operators as results from the order in question.

13. Since early in 1933, a 10-acre spacing rule has been in force. More than 65% of the wells completed in the field have been drilled as exceptions to the Commission's spacing rules. There is no uniformity of spacing in the field. The average density now is one well to about five surface acres. Throughout the field there are many tracts that have been drilled to a much greater density than one well to five acres, many being drilled to as great a density as one well per one tenth surface acre. To illustrate; 8133 acres have been drilled to an average density of one well to each 1.8 acres; and 38,293 acres have been drilled to an average density of one well to each 3.2 acres. Densely drilled areas are not confined to any particular part of the field, so it is quite apparent the condition does ont exist as a result of an attempt to conserve the oil and gas. The 20 barrel minimum per well per day provided by the order operates to the distinct advantage of these densely drilled tracts and allows them to produce many times as much oil as other tracts less densely drilled but with equally as great, and sometimes

much greater, reserves. The former will get many times the amount of recoverable oil and under their lease; the latter will get substantially less than the amount of recoverable oil under their leases. This plan of distribution results in the unnecessary drainage of plaintiff's lease that could be prevented without resulting in waste, and will prevent plaintiff ultimately recovering its proportionate or fair share of the recoverable oil originally or now in place under its lease.

14. The average production in the field per 100 acre feet is 13.28 barrels per day, while plaintiff, notwithstanding the fact that its Todd "A" lease is substantially better from the standpoint of reserves, pressures and other factors governing the productivity of a lease than the average of the field, is allowed to produce per day only 10.11 barrels per one hundred acre feet of sand, or about 76% of the average of the field.

15. The Commission's proration orders for the East Texas field of September 11 and September 29, 1939, December 20, 1939, and January 24, 1940, and the schedules issued in connection therewith, are all substantially the same. Accompanying them were shut down orders. The shut down order of January 24, 1940, required the closing of all wells in the East Texas field, except wells classed as marginal wells, for twelve days during the month of February, 1940.

16. The salient provisions of such proration orders and schedules are:

(a) They fix a top allowable for the field of approximately 691,000 barrels per producing day. Producing only four days a week, this averages about 400,000 barrels per day over the seven days of the week. If the other wells in the field were operated seven days a week like the marginal wells, the discrimination would be more pronounced.

(b) They allot 20 barrels per day to each well capable of making that many barrels, or more. There are some 25,456 wells of this kind to which are allotted (on the 20 barrel minimum) approximately 509,000 barrels per day under this

particular clause of the order. These wells are closed in an average of three days a week under the February order.

(c) The wells incapable of making 20 barrels per day are allotted what they can make. These wells are classed as marginal wells. There were some 514 such wells to which are allotted some 6245 barrels per day. Under an interpretation of the marginal well law which the Commission has only recently applied in this manner (these wells, like all others, have for several years been closed in with all others), these so-called marginal wells are allowed to produce every day in the week. Since such wells only produce about 1% of the daily allowable, the court does not find it necessary to pass upon the validity either of this interpretation or the law itself.

(d) The balance of the field allowable, amounting to about 176,000 barrels per day, is allocated among wells capable of making more than 20 barrels per day. Each such well receives in addition to 20 barrels per day, an amount determined by multiplying the proratable oil, approximately 176,000 barrels per day, by a fraction whose numerator is the product of the well's hourly potential by its bottom hole pressure by the thickness of the saturated Woodbine sand underlying the well by the average number of acres per well in the lease, and whose denominator is the sum of such products for all of the wells in the field. Approximately 75% of the daily field allowable is allocated among wells on the per well allowable of 20 barrels per day to each well, regardless of its capacity to produce, as along as it can produce the 20 barrels per day; and about 25% of the daily field allowable is allocated among wells on the formula set forth in this paragraph.

17. The allocation of a minimum allowance of 20 barrels per well per day to all wells in the field capable of producing that quantity of oil is made without regard to density of drilling on a lease or reserves under leases or the difference between the productive capacity of a well having a daily potential of 20,000 barrels and one having a daily potential of 21 barrels. The reasons or theory for giving the poorest well on small or densely drilled tracts in the poorest part of

the field the same minimum allowable (20 barrels per day) as is given the best wells on large tracts in the best part of the field with a density of 1 well to 5 or 10 acres, thus taking up all but about 176,000 barrels of the daily allowable, are most vague and indefinite, and no substantial evidence was offered to justify any such plan or order, and there was no substantial evidence upon which such an order could be based. The arbitrary allowance of a minimum of 20 barrels per day to all wells that can produce that amount of oil is not necessary to prevent waste or to prevent drainage from one tract to another or from one section of the field to another, or to prevent premature abandonment of wells. On the contrary, it unnecessarily creates waste of the oil and energy, and obviously and necessarily causes migration of oil from one lease (including plaintiff's) to others not so favorably situated and to densely drilled tracts, and causes low pressure areas and the gas to come out of solution in some sections of the field, and unreasonably takes oil from some operators (including plaintiff's) and gives it to others.

18. Under the present and prior orders, the plaintiff has not produced over 200,000 barrels of oil it would have produced had said proration orders allocated the allowable among producers on a basis giving substantial effcet to recoverable oil in place, true potentials, position on structure or similar factors which express the quantity of recoverable oil under tracts and their ability to yield such oil. The orders of September 11, 1929, December 20, 1939, and January 24, 1940, gave plaintiff no real relief. While the Commission increased the daily allowable and thereby gave plaintiff more oil each day, all other wells that could produce it got more oil, and plaintiff's ratio of the daily field allowable remained practically the same. Under the order of June 19, 1939, if the then allowable of 522,000 barrels had been increased to 690,000, plaintiff would have been allowed to produce more oil than under the present order. Under the present order, plaintiff gets 68/100,000ths of the proratable oil. Under the order of June 19, 1939, it got 200/100,000ths of the proratable oil. The present plan of proration denies to plaintiff an equal opportunity with others

in the production of oil. If the present or a similar plan of proration is continued for the producing life of the field, plaintiff will probably thereby be prevented from producing several hundred thousand barrels of recovorable oil originally and now under its lease, and which plaintiff could produce without waste or injury to others under proper proration regulations. The present market value of oil in the field is $1.10 per barrel.

19. The exact reason, if any, why every well capable of making 20 barrels of oil per day is allowed to produce a minimum of 20 barrels a day does not appear from the evidence. Such a plan discriminates between wells and properties, and it is found to be unnecessary and unjustifiable because of the following facts:

(a) It does not tend to prevent waste, but contributes to unnecessary waste. It does not prevent drainage, but causes unnecessary and unreasonable drainage from one lease to another. It does not tend to give operators an equal opportunity to recover their oil, but tends to make recovery opportunities unequal, and allows one operator to take oil from another operator's lease.

(b) Of the approximately 25,900 wells in the field, about 15,000 could be closed in without creating waste. This could be done and at the same time, leave operators with wells sufficient adequately to drain their property. These unnecessary wells take up 300,000 barrels of the daily allowable as a result of the 20 barrel minimum; and, under the formula, an additional amount of the daily allowable is allocated them, leaving little oil to allocate to the better properties.

(c) Continuation of the policy of the Commission to grant additional permits, even though the field is now more than sufficiently drilled, can easily take up practically all of the allowable.

(d) Although under open flow conditions the "fairway" would have a distinct advantage over both the west and east sides of the field, due to water encroachment on the west and dissipation of pressures on the east, and the "fairway"

with its maintained pressures would recover more recoverable oil than was under it, while the east and west would not recover as much, this allowance of 20 barrels reverses this natural advantage.

(e) Since the east side is more densely drilled than some other sections of the field, and since heavy withdrawals on the east cause the gas to go out of solution, it is quite apparent that the giving of 20 barrels to all of these wells unnecessarily draws upon the reservoir energy, all of which would be prevented substantially by reducing this allowance to 5 barrels per well or to 5 barrels per tract. Many of these wells have profitably pumped at the rate of only about 5 barrels per day on only 4 to 5 days a week, as shown by the Commission's schedules. Wells have not and will not be prematurely abandoned at 5 barrels a day. If the Commission, by pooling, unitizing, closing in of unnecessary wells, or the like, would reduce the withdrawals further on the east side and in other sections of the field, from a waste standpoint, this would benefit the field more. If the same were also done on the west side, where water is being produced, from the standpoint of waste, less would be created by such method, because the production of large quantities of water dissipates the lifting energy, and no oil would be lost, but would move up-structure to be recovered by other operators. Doing the same in the fairway would likewise be beneficial. Densely drilled tracts, many of which are to the east of the "A" lease, cause low pressure areas, and thus create waste likewise, wherever situated, and oil from other areas in the field not so densely drilled, like plaintiff's, migrates to these low pressure areas.

(f) The allocation of any substantial part of the allowable to wells, instead of allocating same principally on such factors as reserves, position on the structure, and the like, where spacing is so uneven, results in unreasonable and unnecessary drainage and waste.

20. Under any plan of proration, except one which causes all the rest of the field to be closed in, which is impractical and improper, the west side, as under open flow, will lose a substantial amount of oil. This is a natural disadvantage.

The principal difficulty with the present order is the 20 barrel minimum. If it were eliminated, operators would, under the other parts of the order, produce more nearly in relation to their reserves and position on the structure and on more nearly an equal basis with others and with more nearly an equal opportunity. The loss to the west could be reduced to some extent, if the Commission desires, by a slight adjustment of its present formula without the 20 barrel minimum. The 20 barrel minimum applied to the entire field does not remedy or tend to remedy this condition. The writing of a formula, however, is strictly up to the Commission, and this finding is made only to show the unreasonableness of the 20 barrel minimum.

21. As a consequence of the method of allocation used, densely drilled leases in any part of the field receive much more allowable in proportion to reserves than neighboring leases less densely drilled; and leases in the eastern and western portions of the field, where the oil sand is relatively thin, are allotted much higher allowables in proportion to their reserves than are leases in the "fairway" where the oil sands are thickest and the reserves greatest. The "fairway" properties, except those which are very densely drilled, are being and will be severely drained, by the leases lying in the eastern part of the field. This is a result of the present plan of proration, and plaintiff "A" lease is one of those so suffering drainage. Under the existing order, or orders similar thereto, the less densely drilled areas and particularly leases in the "fairway", including plaintiff's "A" lease, are not afforded an opportunity currently to recover their fair share of the oil, and in all reasonable probability will not, under the present plan of proration, ultimately recover substantially the equivalent of the recoverable reserves originally or now under them; while the densely drilled leases and leases particularly in the eastern portion of the field are currently afforded an opportunity to recover far in excess of their fair share, and ultimately will in all reasonable probability be afforded an opportunity to produce far in excess of the equivalent of the reserves originally and now underneath them.

22. There is not any reasonable probability that the time element will take care of plaintiff under the present plan of proration. The producing sand to the east of plaintiff's lease is much higher than even the top of plaintiff's sand, and as the water approaches from the west, the oil under plaintiff's lease is being pushed up-structure to the east faster than plaintiff is allowed to produce. If the present plan is continued, the effect of this movement will increase with time, and prevent plaintiff's recovering an amount of oil substantially equivalent to its original recoverable reserves or its present recoverable reserves. The abandonment of wells along the small band around the east side, due largely to fingerings of sand into the shale, lack of oil in the first place, and mechanical equipment or method of completion, and abandonments on the west by water encroachment, will afford plaintiff no substantial relief. Additional wells are now being permitted to be drilled by the Commission.

23. There is no substantial evidence to justify the Commission's permitting operators on the east and in other poorer sections of the field and on small or densely drilled tracts to produce disproportionately in reference to reserves and position on the structure now while plaintiff is required to wait an indefinite period of time (if ever) to get its oil. The practice does not prevent waste or prevent drainage, but on the contrary, causes unnecessary waste and drainage.

24. It costs about $10,000.00 to drill and equip an oil well in the East Texas field. It costs about $2500.00 to equip a well with pumping equipment. Most pumping wells in the East Texas field can be operated at a profit on a daily production of as little as 5 barrels each. Many pumping wells in the field have been operated over a period of years on an average production of less than 5 barrels per day, as shown by the Commission's schedules. A few pumping wells on the west, if producing large quantities of water, may not be able to operate at a profit if producing no more than 5 barrels of oil per day; but if such wells were closed in, practically all, if not all, of the recoverable oil in the

tracts on which such wells are located could be produced by other wells, and no substantial physical waste of oil would result from the abandonment of such wells. Flowing wells in the East Texas field can be operated at a profit on less than 5 barrels per day production.

25. Practically all wells in the field have been drilled more than two years, and have produced more than a sufficient amount of oil to pay for the cost of drilling, equipping, and operating such wells. Some of the wells drilled within two years from this date have doubtless paid out, while many of the wells drilled less than two years ago have in a large measure paid out.

26. Plaintiff has repeatedly and diligently endeavored to obtain administrative relief from the Railroad Commission of Texas, and to secure an adjustment of the allowable for its wells in the East Texas field in such manner as to afford it an opportunity currently and ultimately to produce its fair share of the oil from the field. In spite of such efforts the defendant Commission has failed and refused to grant to plaintiff the relief sought.

27. Enforcement of the present plan of proration results in the taking of plaintiff's property and giving it to others, without any compensation and without any reasonable necessity. Plaintiff is denied a reasonable opportunity to produce currently a very substantial quantity of oil which it would be entitled to produce under a proper method of regulation. The loss to plaintiff under such a program amounts to a substantial sum daily, and will amount to a very substantial sum (many times exceeding the minimum jurisdiction of this court) over a period of years, if the program be continued.

28. The regulation by the Commission does not allocate or distribute the allowable production for the field on a reasonable basis, and is arbitrary, discriminatory, confiscatory, and unreasonable as applied to plaintiff. It denies to plaintiff a reasonable opportunity to recover its fair share of the oil ultimately, much less within a reasonable time, resulting in a daily loss of much oil worth several hundred dollars, and in the course of a month, a loss of

many thousands of dollars, and results daily in a preventable drainage of oil from plaintiff's lease to the leases of other operators.

B.

Conclusions of Law.

In view of the facts found above, concerning which there really is little or no dispute in the evidence, the following conclusions of law are applicable:

1. This court has jurisdiction of the persons and subject matter involved in this action.

2. Subject to the interests of its royalty holders, which oil it must produce for their credit, plaintiff is the owner of the oil and gas in place under its lease in the East Texas field.

3. As the owner of said lease, the plaintiff is legally entitled currently and ultimately to produce its fair share of the oil produced from the field.

4. Under the statutes of Texas, Articles 6023, 6029, and Section 7 of Article 6049-c, Vernon's Annotated Revised Civil Statutes, the Railroad Commission is the administrative agency charged with the duty of preventing waste; and in administering the conservation statutes is required to apportion or allocate production of oil among properties in each field "on a reasonable basis."

5. The orders of the Commission of September 11 and September 29, 1939, December 20, 1939, and January 24, 1940, and the schedules issued in connection therewith for the East Texas field, as interpreted, applied, and enforced against plaintiff (such orders and schedules being often referred to herein as the Commission's program of regulation for the field) are unreasonable, discriminatory, confiscatory and void as to plaintiff. As to plaintiff, they do not allocate the production in the field on a reasonable basis, as required by the statutes of Texas referred to in the preceding paragraph.

6. The program of regulation complained of by plaintiff does not within reasonable limits protect the property rights

or privileges of plaintiff; it does not give to plaintiff the opportunity to produce currently its fair share of the daily allowable, or prevent reasonably avoidable drainage of its property, although plaintiff has more than enough wells already drilled on its property from which its fair share can be produced without waste. To require plaintiff to drill any further or additional wells upon its property would be to require plaintiff to make unnecessary and wasteful expenditures of money and, in itself, would be a confiscation of plaintiff's property.

7. Such program of regulation operates to confiscate plaintiff's property, and unreasonably discriminates against plaintiff, contrary to the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States; and such program of regulation is void as far as plaintiff is concerned. It is not necessary to prescribe and enforce such a program of regulation against plaintiff in the East Texas field in order to prevent physical waste of oil and gas, or for any other reason.

8. Plaintiff is currently suffering immediate and irreparable injury under such program of regulation, and, so long as such program is maintained in force and effect, will continue to suffer irreparable injury. Plaintiff is without an adequate remedy at law to protect itself against losses which have occurred and which will continue to occur under the program of regulation now in vogue. An injunction restraining defendants from enforcing such a program of regulation against plaintiff in the East Texas field is necessary to the protection of plaintiff's property.

9. The marginal well statute (Acts of 1931, 42nd Leg., Reg. Sess., p. 92, c. 58; Article 6049b of Vernon's Annotated Revised Civil Statutes of Texas) is not patently invalid. Since it appears that less than 1% of the total daily allowable production from the field is allotted to marginal wells as defined by the statute, the court finds it unnecessary to pass upon the validity of said marginal well law or the present interpretation placed thereon by the Commission.

10. The law does not require that plaintiff should seek relief from the Commission before bringing this action, but

even conceding that, as a general rule, relief from a court should not be sought if the same relief could promptly be obtained by application to the administrative agency (Commission in this instance), then it appears that plaintiff, an interested person, has already sought such relief from the Commission and has fully exhausted its administrative remedy without obtaining relief.

11. There was no substantial evidence to support the Commission's order and there was no showing made that the Commission had based the order on any finding, and there was no substantial evidence to support a finding upon which the order could be based.

12. The record shows virtually no dispute as to the facts. The law being clear as applied to such facts, the court finds that an injunction should issue, substantially as prayed for by plaintiff, enjoining defendants from enforcing, or attempting to enforce, the orders and schedules complained of against plaintiff or its properties in the East Texas field, or from suing for or otherwise attempting to claim or collect penalties, or to enforce forfeiture, or in any other manner to penalize plaintiff or the oil produced as set forth in the final judgment to be entered in this action as directed by the court.

The final judgment is directed accordingly.

Done as of date the 29th day of May, 1940.

Samuel H. Sibley, Circuit Judge; James V. Allred, District Judge; Robert J. McMillan, District Judge.

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